IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 648 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and MR.JUSTICE A.L.DAVE

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judges. No

AKBARKHAN YUSUFKHAN PATHAN

VS

STATE OF GUJARAT

APPERANCES:

MR RAJESH M. AGRAWAL, ADVOCATE FOR THE APPELLANT
MR A.J.DESAI, ADDL.P.P. FOR THE RESPONDENT STATE.

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coram; J.N.BHATT AND A.L.DAVE,JJ.
date of decision: 28.9.1998.

ORAL JUDGMENT: per BHATT,J

By virtue of the impugned conviction judgment and order, the appellant- accused Akbarkhan Pathan came to be convicted for having committed offences punishable under Section 302,IPC and Section 135 (1) of the Bombay Police Act and resultant sentence of imprisonment for life and to fine of Rs. 500/- and in default,to undergo 5 months; R.I. under Section 302,IPC;whereas 15 days' R.I.. and

fine of Rs. 100/-,in default, further R.I. for 10 days for the offence under Section 135 (1) of the Bombay Police Act. Whether the said judgment is legal and valid is the sole question raised before us in this conviction appeal by the appellant-accused.

A short resume of the prosecution case may be stated first with a view to appreciating the merits of the appeal and challenge against it. The accused was sent up for trial before the Sessions court on the following allegations and version of the prosecution:

That at about 8 a.m. on 17.3.1992,near the factory premises of Moinkhan in Millat Nagaar, Maninagar, Ahmedabad, the accused who was working as an employee alongwith his father in the shop of deceased Mukhtyar Ahmed .firstly raised a demand for Rs.200/- from the deceased for auspicious Ramzan festival to which the deceased flatly denied. Being aggrieved and agitated, the accused went away ,though his father continued to work there. Within about 20 minutes thereafter, he came with a knife and inflicted two knife blows on the person of the deceased out of which one landed on the chest and the other on side portion of waist. Therefore, in order to ward off the said blow, the deceased obviously made an attempt to snatch away the knife from the hand of the accused and in that process, there was scuffle.The accused also sustained injuries . He fled away from the venue of offence and deceased who had sustained serious injuries succumbed to the same before he could be taken to the hospital for treatment.

The dead body of the deceased was shifted to L.G. Hospital, Ahmedabad . The deceased,on being examined medically, was declared dead. Intimation to that effect was given by the hospital to the constable on duty in the hospital who in turn sent it to Maninagar police station, as a result of which,the concerned PSI rushed to the hospital ,recorded the complaint of the brother of the deceased,Zakir Ahmed as narrated by him which is produced at exh.8.

The PSI J.K.Vachhani,P.W.9, exh.28 after making a special report,started investigation. Statements of witnesses were recorded and panchnamas were prepared. Samples and muddamal articles were sent to the Forensic Science Laboratory for examination and report and upon completion of the investigation,the police charge-sheeted the accused before the Metropolitan Magistrate who in turn committed the accused to the City Sessions court at Ahmedabad for trial wherein, sessions case No. 300 of

1992 was registere against the accused and charge was framed against the accused at exh. 2 on 12.12.1992 for the offences punishable under Section 302, IPC and under Section 135 of the Bombay Police Act to which the accused denied and desired to be tried.

The defence of the accused has been that he being employee of the deceased ,demanded an amount of Rs.200/which was a cheap source of indignation and agitation on the part of the deceased on the day of the incident like that on 17.3.1992.The accused again requested for the same amount as he wanted to celebrate Ramzan festival. He also told the deceased that business is run very well because of Ramzan month, therefore,what objection he could have in giving the amount Rs.200/-? Since his request went in smoke as it was not acceded to by the deceased, he stated that now he will find out employment elsewhere.It is further the case of the defence that thereafter deceased Mukhtyar became very wild and agitated. Thereafter, the accused left the shop of the deceased.

It is further the case of the defence that he went to another shop for employment and he got the job as such and he was also likely to get Rs. 200/- from the new master. Subsequently, he returned to the shop of the deceased where his father was working. On coming back, he told his father that since he had obtained a job,his father also should not continue to work in the shop of the deceased.Therefore, it is the version of the defence that the deceased again became very much agitated and annoyed and shouted at the accused saying that he can go to any place he likes but why he insisted his father to go along with him ? When this happened, the deceased was standing in front of the shop which is a butcher's shop. All of a sudden,the accused was pushed by the deceased. Thereafter, the deceased took out a Rampuri knife and there was scuffle between both .At that time,one Aslam, Munir, Rahisha,Zakirbhaiand other outsiders were present. The accused stated that thereafter he became unconscious and did not know what happened thereafter. Apart from the suggestion put to the witnesses in course of cross examination by the defence counsel, the accused has specifically given narration of the defence account and the circumstances in his further statement recorded before the trial court under Section 313 of the Code on 20.5.1993. It is the defence of the accused that the deceased was aggressor and he caused injuries to the accused and made him unconscious.

The prosecution case is sought to be proved by the

evidence of P.W. 1 Zakir Husein,exh.7 who is the brother of the deceased and other eye witness P.W.5, Murtaza exh.14 and the medical evidence and documentary evidence.

We have exhaustively heard learned advocate for the appellant Mr.Agrawal and learned Addl.P.P. Mr.Desai.In course of his marathon submissions on different dates, Mr.Agrawal has taken us through testimonial collections and documentary evidence.

The prosecution has placed reliance on 11 prosecution witnesses .It has also placed reliance on the documentary evidence to which reference will be made by us at appropriate stage.

Before we embark upon the analysis and evaluation of evidence of the prosecution, vehement criticism levelled against the impugned judgment and order and the prosecution case by Mr.Agrawal for the appellant may be articulated at this point.

(i) That the evidence of P.W.1 Zakir Husein ,exh.7 and P.W.5, Murtaza,exh. 14,brother the complainant,is wrongly relied on by the prosecution. The witnesses are relatives and partisan . Again, P.W.1 Zakir Husein has not stated as to how injuries were inflicted by the accused when and where; whereas P.W.5 Murtaza has stated that injuries were caused but he has not stated on which part of the body. Therefore,it was vehemently contended that evidence of these two witnesses becomes unreliable on that count also.

(ii) The accused did sustain serious injuries on different parts of the body and the prosecution has not successfully explained the same and,therefore, the case of the prosecution becomes not only weak but very doubtful.

(iii) That the investigation in the present case is tainted , in that, he has cited one incident that samples and muddamal articles were sent by the investigating officer on 29.3.1992; whereas, according to the evidence forensic science laboratory, they had received the same on 22.3.1992. It was also pointed out that investigating officer has pleaded ignorance when he was confronted as to when he had recorded statements of neighbouring owners of shops;whereas, there is evidence on record that

there were shops and that some of them were open.

On these counts, it was contended that the investigation is rendered unreliable being tainted and it should be neglected and benefit of doubt should go to the accused.

In support of his contentions, he has placed reliance on various authorities to which we will refer at appropriate stage as and when required.

The aforesaid contentions propounded by Mr.Agrawal have been seriously countenanced by Mr.Desai,learned Addl.P. by contending that:

(i) P.W.1 Zakir Husein and P.W 5 Murtaja are eye witnesses and their presence at the scene of offence was natural and their testimony is quite just, reasonable and confidence-inspring.

(ii) That the prosecution has sufficiently explained the injuries sustained by the accused .In the alternative, he submitted that the prosecution invariably in all cases would not result into fatality even if injuries remained unexplained provided the prosecution case is established by clear,consistent ,coherent and direct evidence,as in the present case.

He has thus fully supported the impugned judgment and order and has placed reliance on the decision of the Honourable Apex court in Baitullah v. State of U.P.,JT 1997 (8) S.C. 433.

Insofar as the first alternative contention is concerned, it was contended before us that evidence of P.W.1 Zakir Husein at exh.7 andP.W.5 Murtaza .Exh.14 cannot be relied on as they are interested and related witnesses. It is true that Zakir Husein is brother of the deceased and who was working along with his brother in butcher's shop. It is equally true that P.W.5 Murtaza,exh.14 is father-in-law of Zakir Husein.Thus,both the eye witnesses are related to the deceased.

The question that requires to be considered is-whether their evidence should not be relied on merely because they are related to the deceased ? We may make it clear at this juncture that it isn't relationship that counts.It is not intimacy that matters, it is not closeness which affects, but it is reliability, dependability and trustworthiness that counts and matters while appreciating and analysing the evidence of

prosecution. It is a settled proposition of law that evidence of a witness cannot be thwarted away or cannot be thrown over-board merely on the ground of relationship. The main anxiety of the court while examining and appreciating the evidence of a witness is to assess its reliability and dependability and not relationship.Again, in a capital charge like the one on hand, which involves death because of murder, relatives of such unfortunate victim of violent crime ,that too close relatives, would not be interested in wrongly implicating a third person in place of the real culprit or offender. On the contrary, their anxiety would be to see that wrong doer or offender is brought to book and is punished. Therefore, the contention that P.W. 1 Zakir Husein and P.W. 5 Murtaza being relatives of the deceased cannot be relied on and their evidence being partisan witnesses should be discarded ,is required to be discarded.

In this connection, our attention was invited by the learned Addl. P.P. Mr. Desai to the decision of the Honourable Apex court in Baitullah's case (supra).We have carefully examined this decision .The ratio propounded and the principle laid down in this decision is that eye witness evidence and supported by medical evidence cannot be brushed aside merely because eye witnesses are related or interested. Proposition which we have highlighted above is provided reinforcement by this decision.

Again,a half-hearted attempt is made in contending that both the eye witnesses should not be believed because of discrepancies which we have narrated and articulated at point no. (i).Assuming that such discrepancies were there,then also, they are at micro level and would not affect the main substratum and core of the prosecution case. The prosecution case cannot be rejected merely on the ground that there are some contradictions of micro level. It must not be forgotten that trial is held after long time after the incident occurs. Witnesses come from small places who are some times rustic villagers and at times even urban independent intelligent witness also may not be able to vividly mention or narrate the incident after a long time when he enters into witness box like replay. This aspect has also to be considered.It is true, if testimony of prosecution witnesses are found to have been tainted and influenced by malice or otherwise and it affects the main substance and heart of the prosecution case, the first contention raised before us in the factual scenario may become acceptable.But so is not the factual situation in the present case.

Apart from the too minor discrepancies pointed out by Mr.Agrawal, we have dispassionately gone through the entire evidence of these two eye witnesses and we have no hesitation whatsoever in holding that their testimony undoubtedly radiates an imprint of truth. Again , more so, when their presence was quite natural at the time of incident and they being relatives of the deceased, would not be interested to falsely involve the accused with whom they have no axe to grind.We have found that the evidence of P.W.1 Zakir Husein ,exh.7 is quite trustworthy and dependable. His evidence is ipso facto sufficient to transfix the rigors of offence under Section 302,IPC.The manner and mode in which he has narrated the incident clearly supports the prosecution case and as noticed by us,not only reasonable , believable but very natural. Again, his testimony is fully reinforced by the complaint lodged by him before the police inspector,which is produced at exh.8. Needless to reiterate that the complaint came to be recorded within a spell of two hours after occurrence of the incident. This FIR was lodged with promptitude and without loss of time which fully reinforces the version of evidence of complainant, P.W.1 ,exh.7. His evidence is fully corroborated by the evidence of P.W.5 Murtaza, exh.14.

P.W.5,Murtaza,exh/ 14 who is relative of the deceased and father-in-law of younger brother of the deceased would not be interested to falsely implicate the accused in place of the real offender.His evidence was found quite natural as he was staying in the near vicinityof venue of incident at the relevant time.We have also thoroughly examined the evidence of Murtaja , eye witness who has inspired our confidence..It suffers from no vice.In fact,his evidence runs quite smoothly like knife going through butter.It is fully supporting the prosecution case and the evidence of eye witness Zakir Husein.

Therefore,in our opinion, evidence of two eye witnesses is fully supporting the prosecution case and there is no reason to disbelieve their testimony.Moreover, their evidence and the prosecution case is fully reinforced by medical evidence of Dr.Harsh Palekar,P.W/.11, examined at Exh. 36. According to his evidence, the injuries sustained by the deceased were ante-mortem and were sufficient in ordinary course of nature to cause death.

It is very clear from his evidence that cause of death of the deceased was shock and haemorrhage as a result of the injuries sustained by the deceased and the injuries sustained by the deceased were possible by a sharp

cutting instrument like knife and the death had occurred 24 hours before the post mortem was performed. The post mortem report is produced at exh.37.Thus, the prosecution case is fully corroborated by the medical evidence and evidence of two eye witnesses.

We have,therefore, no hesitation of whatsoever nature that the author of the murder of the deceased was nobody else but the present appellant ,as rightly held by the trial court .The defence of the accused that the deceased was the aggressor and he was attacked by the deceased is not only not proved by him as required under law but is disproved by the evidence of the prosecution. The defence of the accused that out of indignation and excitement,the deceased took out the knife and started inflicting blows on his person and he had not attacked at all on the person of the deceased is proved to be to totally false.

We have undoubtedly noticed from the evidence of prosecution that the accused did demand an amount of Rs., 200/- from the deceased as he wanted to celebrate Ramzan festival ,in the early morning immediately after opening of butcher's shop by the deceased, which was refused by the deceased.This caused unbearable agitation and unhappiness to the accused.Admittedly, the accused and his father were working as employees of the deceased who was running the said shop. The accused has also stated in his further statement under Section 313 that he did demand Rs.200/- from the deceased and he had denied. Therefore, he went in search of another job which he got very soon and came back; whereas, the case of the prosecution is that on refusal of his demand by the deceased, the accused became wild and in agitated mood, left the place and returned back with a knife and inflicted two knife blows on the person of the deceased which caused death of the deceased.This incident was seen by two eye witnesses viz.P.W.1 Zakir Husein and P.W. 5 Murtaza. Their presence was quite natural at the shop. Zakir was the brother of the deceased and working with the deceased in the said shop while P.W.5 Murtaza was father in law of Zakir Husein. The evidence of these two eye witnesses is succinctly reinforced by the medical evidence and is also supported by the FIR ,exh.8 which was lodged by P.W.1 without any loss of time within a spell of two hours immediately after taking the deceased for medical treatment in L.G.Hospita at Ahmedabad.

The defence of the accused that there was scuffle when the deceased took out a knife and in that process, he sustained injuries and he became unconscious and

thereafter what happened, he did not know, is nothing but cock and bull story.It is crystal clear from the evidence of the eye witnesses that it was the accused who ,20 minutes after the first incident during which he had demanded Rs.200/- from the deceased, returned to the place of the deceased with a knife and inflicted two successive blows and it was the deceased who in the course of avoiding the third blow on his person, had a scuffle with the accused and in that process, the accused sustained injuries.There is no doubt about the fact that the accused had sustained serious injuries as per the medical evidence on record. Dr. Trivedi, P.W. 3, was examined at exh. 11 who had examined the accused.The medical certificate is produced at exh.12. The accused was also hospitalised as an indoor patient.Relying on this aspect, it was contended that the accused had sustained injuries and the prosecution has failed to explain and therefore, benefit of doubt should go to the accused .No doubt,ordinarily, it is true that if prosecution fails to explain the injuries sustained by the accused, there may arise a doubt and benefit of that doubt should go to the accused. However, this submission does not apply in light of the facts of the present case for the simple reason that the prosecution has successfully established that the deceased and the accused had a scuffle and during the course of that scuffle , the deceased tried to snatch away the knife from being inflicted further blows by the accused in which, the accused sustained injuries.The injuries sustained by the accused are successfully explained . Apart from that,it is very clear from the further statement of the accused under Section 3l3 that he had a scuffle with the deceased and in that process, he had sustained injuries which resulted into unconsciousness.It is also shown that these injuries were sustained by the accused in the course of the episode. Therefore, the factual contention that injuries on the person of the accused have not been explained is untrue and unjustified. It may be noted that prosecution is not bound . and so is the case. to explain the injuries sustained by the accused during the scuffle. If the prosecution can prove and lead evidence which is quite reasonable, trustworthy and dependable, the case of prosecution cannot be thrown overboard and in such case, non-explanation of injuries cannot operate as fatal.This proposition of law is very much settled.However, that legal aspect would not be applicable in the present case since factually, the contention is without any leg.Therefore,that contention is also must fall to the ground and it is rejected.

Learned advocate for the appellant has placed reliance on Sarwan Singh vs. State of Punjab, AIR 1957 SC 637. This decision reiterates the principle applicable in the criminal case.It is held that the case of prosecution must be established.It must be true and not, 'may be true'. There cannot be any dispute about this proposition.

He also relied on vs 1998 (3) Crimes, SC 95 and B.N.Singh vs. State ofGujarat, 1990 SCC (cr.) 283.Both these decisions pertain to appreciation of evidence of interested witnesses.Both these decisions are not applicable to the facts of the present case .In the present case, it cannot be said that P.W 1,Zakir Husein and P.W. 5 Murtaza were interested witnesses. They were no doubt related. However, their evidence is found quite clear, consistent and coherent and,therefore,merely on the ground of relationship, their testimony cannot be rejected.

Reliance is also placed on the following authorities:

(1) Bhagirath vs. State of M.P.
AIR 1976 SC 975;

(2) Deoraj Deju vs. State of Mahrashtra,
1996 (1) CRIMES, 486

(3) Seriyal Udayar vs. State of Tamil Nadu
AIR 1987 SC 1289

(4) Lakshmi Singh vs. State of Bihar,
(1976) 4, SSC 394

We have gone through dispassionately the aforesaid decisions.All the principles laid down therein are not applicable to the facts of the present case. Therefore, the aforesaid decisions also do not come to the rescue of the accused. It may also be noted that case law ,more so,in criminal trial, is required to be appreciated in light of the facts. So, decision is rendered in light of important facts or special circumstances.If these special circumstances and special aspects which have weighed with the court are present in the case on hand, obviously, the case law will be attracted. However,as we have discussed above, the factual scenario highlighted by us earlier does not attract the proposition and principles propounded in the aforesaid decisions.Therefore, Mr. Agrawal is unable to make any capital out of the said

case law which he tried vehemently during the course of his marathon submissions before us.

Mr. Agrawal submitted that evidence of eye witness Zakir Husein has not clearly narrated in his complaint about the presence of Murtaza.He has also not stated about presence of P.W. 1 . It was,therefore,contended that presence of Murtaza is doubtful and since Murtaza has stated that he was present, evidence of Zakir Husein becomes doubtful.It may be noted that it is not imperative for the complainant to mention names of eye witnesses in the FIR. FIR, as such,under Section 154 of the Code ,is not for narration of the entire incident with minute details. Therefore,, the contention that name of eye witness Murtaza was not mentioned by Zakir Husein is of no avail and does not take the defence case any further. Consequently, the submission that name of eye witness was not mentioned by the complainant in his complaint is factually not sustainable as we have found that he did state in his evidence. Therefore, this submission is also without any substance and accordingly, it is rejected.

After having considered the aforesaid factual scenario,the entire testimonial collections and relevant documentary evidence and the motive,which, as such, is not required to be established in all cases by the prosecution for proving the guilt. When direct evidence is led, the motive pales into insignificance.In the present case, the motive may not be necessary to corroborate the case of the prosecution,as there is direct evidence of two eye witnesses supported by medical evidence and immediately lodged FIR. Nonetheless, it may be stated that there was motive for committing crime the accused as his master - the deceased, did not oblige him on his demanding an amount of Rs. 200/- , 20 minutes before the main incident occurred. In our opinion, to demand cash money by the accused from his master and on failure to get it, his going back disappointed and then coming 20 minutes after with a knife in presence of various persons including two eye witnesses in a broad day light in Bazaar and satisfying his intention to finish his master by giving two successive blows , is nothing but prompted premeditation and desire to do away with his master.In short, the accused is undoubtedly the author of the serious crime of culpable homicide amounting to murder. Therefore, the accused is clearly liable for having committed offence punishable under Section 302,IPC which is rightly held by the trial court and,therefore,the impugned judgment and conviction order of holding the accused guilty for the offence under

Section 302,IPC and also under Section 135 (1) of the Bombay Police Act is quite justified , as we are fully satisfied. The quantum of sentence is not argued. However, it may be mentioned that the trial court has imposed only minimum sentence under Section 302 and even the sentence awarded under Section 135 (1) of the Bombay Police Act is also just and reasonable. We, therefore,find no substance or merit in this appeal which deserves to be dismissed which is accordingly dismissed.

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